Federal Court  Cour fédérale

Date: 20200228

Docket: IMM-2370-19

Citation: 2020 FC 312

Ottawa, Ontario, February 28, 2020

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

**HALIL YURTSEVER, ELIF YURTSEVER,
CEMIL TARIK YURTSEVER,
SEDEF YURTSEVER**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicants, a family of five (5), are all citizens of Turkey. The principal applicant, Halil Yurtsever [Mr. Yurtsever], is a member of the "Gulen" or "Hizmet" movement. The current Turkish government considers the movement's founder to have been behind the *coup* attempt in Turkey in July 2016. Since that time, Turkey considers the movement's founder and

its members as terrorists. The founder currently lives in exile in the United States of America. Mr. Yurtsever and all but one member of his family either have, or had, permanent resident status in South Africa. The Minister contends the one family member without status, a minor, Sedef Yurtsever, can readily acquire South African status through her father, the principal applicant.

[2] The applicants sought asylum in Canada under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. They contended they could not return to South Africa as they no longer had status in that country, and would be at risk of extradition and kidnapping at the hands of Turkish authorities. The Refugee Protection Division [RPD] rejected their claim on the basis of s. 111(1)(*a*) of the *IRPA*, concluding they were excluded from protection based upon article 1E of the *United Nations Convention Relating to the Status of Refugees* [*Convention*]. The Refugee Appeal Division [RAD], by decision dated March 26, 2019, dismissed the applicants' appeal from the RPD decision. This is an application for judicial review pursuant to s. 72(1) of the *IRPA* from the RAD decision. For the reasons set out below, I allow the application for judicial review and remit the matter to the RAD for redetermination.

II. Decision under Review

[3] The RAD considered whether the applicants were excluded pursuant to article 1E of the *Convention* because of their permanent resident status in South Africa. The RAD cited the test from *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 at para 28, 402 NR 154. The RAD concluded the Minister had established a *prima facie* case that the applicants had status in South Africa. The onus then shifted to the applicants to demonstrate why they were not

excluded. After assessing the evidence pertaining to each applicant, the RAD concluded the applicants had failed to produce any reliable evidence they had lost their permanent residence status in South Africa. Furthermore, as already indicated, it concluded the minor applicant, Sedef, is eligible to obtain permanent resident status based upon her father's status.

[4] The RAD also considered the applicants' alleged fear that South African authorities will succumb to the political pressure from Turkey and deport them to that country. The RPD concluded the applicants were not credible regarding their fears in South Africa because they failed to mention those fears in their Basis of Claim form. The RAD agreed, stating it was reasonable to expect the applicants to include such fears in their written narrative. The RAD concluded the applicants have no fear of returning to South Africa as members of the Gulen movement. In reaching this conclusion, the RAD acknowledged the documentary evidence that demonstrates Turkey is pressuring foreign governments to extradite members of the Gulen movement, but concluded South Africa is not succumbing to such pressure.

[5] Importantly, I note that the applicants submitted new evidence to the RAD pursuant to s. 110(4) of the *IRPA*. That evidence constituted 18 documents, including, among others, letters, an RPD decision in a similarly situated circumstance, and news articles. The RAD accepted all of the items into evidence and then assigned "no evidentiary weight" to each document. The RAD assigned the letters no evidentiary weight because they lacked important details, supporting evidence, or information regarding the applicants' allegations. The RAD assigned the similarly situated RPD decision no weight because, according to it, each claim "must be decided on its own merits". The RAD assigned no weight to the articles which reported Turkey's attempts to

hunt down members of the Gulen movement outside of its borders because the articles did not assert South Africa was collaborating with Turkey in that regard.

[6] The applicants also submitted documents pursuant to rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257. The RAD found that while those documents discussed Turkey's attempts to hunt down members of the Gulen movement outside its own borders, they, like the s. 110(4) articles, failed to demonstrate South African authorities were collaborating with Turkey in this regard. The RAD therefore assigned the documents no evidentiary weight.

[7] In the result, the RAD found "there is no evidence which indicates that the South African government is extraditing Turkish citizens living in South Africa back to Turkey or that the South African authorities are targeting individuals or institutions of the Gulen movement". It therefore concluded "the [applicants] would not be persecuted or be in danger of their lives if they were to return to South Africa".

III. Relevant Provisions

[8] The relevant provisions are ss. 96, 97(1), and 110(4) of the *IRPA*, as well as article 1E of the *Convention*, all of which are set out in the attached Schedule.

IV. Issues

[9] While the parties raise a number of issues, I am of the view this application for judicial review can be disposed of by considering two issues. First, did the RAD unreasonably assess the

new evidence offered by the applicants pursuant to s. 110(4) of the *IRPA* when it admitted that evidence and then accorded it "no weight"? Second, did the RAD unreasonably assess documentary evidence for what it did not say rather than for what it did say?

V. Analysis

[10] The standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, 39 Imm LR (4th) 185.

A. Does the RAD's admission of the new evidence followed by the assignment of "no weight" to that evidence create an internal inconsistency?

[11] The analysis required to determine whether to admit new or fresh evidence does not begin and end with the plain wording of s. 110(4) of the *IRPA*. In addition to the express statutory conditions, the jurisprudence requires that the decision-maker apply four (4) criteria in determining the question of admissibility, they being: credibility, relevancy, newness and materiality. The common law principle in this regard has its roots in *Palmer v The Queen*, [1980] 1 SCR 759, 106 DLR (3d) 212 [*Palmer*]. It was introduced to immigration and refugee law in the context of a Pre-Removal Risk Assessment [PRRA] through *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, 289 DLR (4th) 675 [*Raza*]. These criteria are also applied to the admission of new evidence before the RAD by application of *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, 40 Imm LR (4th) 32 [*Singh*].

[12] The considerations of credibility, relevance, newness and materiality are all described, and discussed in some detail, in paragraphs 38 to 47 of *Singh*. For my purposes, no detailed analysis is required of the credibility, relevance and newness criteria. I say this because none of those criteria goes to the issue of the weight afforded to the evidence. The basis for my analysis, in the circumstances, flows from the materiality requirement. Clearly, new evidence may only be admissible if it is material, in the sense that it may have an impact on the RAD's overall assessment of the RPD's decision (*Singh* at para 47).

[13] I am concerned that the decision under review is internally inconsistent, and hence, unreasonable. This concern arises from the fact that the RAD concluded 18 exhibits, which constitute a large part of the applicants' case, met the test of materiality for purposes of admitting them as new evidence, but then assigned that evidence "no weight". As will be explained below, in my view, it is inconsistent to conclude new or fresh evidence meets the test of materiality for purposes of admissibility but then afford that same evidence "no weight".

[14] I am cognizant of the fact that the basic test for admissibility of evidence requires that the proffered evidence be relevant to a material issue subject to the application of any exclusionary rules. See, David M. Paciocco & Lee Stuesser, *The Law of Evidence,* 7th ed (Toronto: Irwin Law, 2015) at 27 [*Paciocco & Stuesser*]; *R v White*, 2011 SCC 13 at para 31, [2011] 1 SCR 433. That test for admissibility does not normally carry with it any weighting considerations (*Paciocco & Stuesser* at 35). There are good reasons for weight not to be a factor in assessing admissibility in the first instance. For example, an eyewitness may possess evidence relevant to a material issue, but following cross-examination, it may be established that the witness, although

credible, has poor eyesight and therefore is not reliable. The lack of reliability may lead a trier of fact to give the evidence minimal or no weight. Such a determination, although made after the evidence is admitted, does not lead to any inconsistency. However, the same approach does not apply to new or fresh evidence on appeal, once admitted. I say this because, in my view, as explained below, on appeal there must be some weighing of the evidence before its admission as "new" evidence.

[15] The materiality criteria as outlined in Raza and Singh is satisfied if the proffered evidence, when taken with other admitted evidence, could reasonably be expected to "have affected the result" (see also Palmer at p 775). In *Raza* at para 13, the Federal Court of Appeal considers s. 113(a) of the *IRPA* which deals with new evidence on a PRRA. In addressing the issue of materiality as it relates to the consideration of the admission of new evidence, Sharlow J.A. for the Court stated: "Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD?". I interpret the words from *Raza* as instructing triers of fact to undertake some weighing of the proposed new evidence before admitting it. Section 113(a) of the *IRPA* contains nearly identical language to that found in s. 110(4), which concerns the admissibility of new evidence before the RAD. This latter provision, s. 110(4), was considered by the Federal Court of Appeal in *Singh*. In *Singh*, the Court fully adopts its analysis in *Raza* regarding credibility, relevance and newness. It does, admittedly, recognize that the test for materiality under subsection 110(4) is more nuanced than that under paragraph 113(a). The justification for this more nuanced approach is because the RAD has a much broader mandate than a PRRA Officer, and may interfere to correct any error of fact, of law, or of mixed fact and law.

[16] The Federal Court of Appeal's observations in *Singh* do not depart from the approach advanced in *Palmer* and *Raza*, that in order to determine whether the proffered "new" evidence may impact the result, some weighing is inherently required. This is particularly true in a case such as that presently before the Court where credibility, relevance and newness are not in issue. In this case, because the RAD admitted the new evidence, it must have determined that the evidence could have affected the result – hence, affording it some weight, even if minimal. It follows that the decision is internally inconsistent. One cannot admit new evidence on the basis of its potential impact upon the result, and then declare it to have no weight. This internal inconsistency results in an unreasonable decision: see *Vavilov* at paras 85 and 102-104.

[17] This notion that "new" evidence, once admitted, has already been assigned some weight, is common parlance in the criminal appeal context. Based upon *Palmer*, in order for new evidence to be admitted on a criminal appeal, it must be relevant, credible and such that it could, when taken with the other evidence adduced at trial, affect the result (*R v Lévesque*, 2000 SCC 47 at para 24, [2000] 2 SCR 487 [*Lévesque*]). The result is that "[t]he appellate court must, to some extent, weigh the potential probative value of the evidence proffered on appeal" (*R v Reeve*, 2008 ONCA 340 at para 72, 233 CCC (3d) 104 [*Reeve*]; *R v Truscott*, 2007 ONCA 575 at para 100, 225 CCC (3d) 321 [*Truscott*]; *Lévesque* at paras 24, 28). If the evidence could not have been expected to affect the result, it would not have been admissible (*Reeve* at para 72*; Truscott* at para 100; *R v Dalton* (1998), 163 Nfld & PEIR 254, leave to appeal to SCC refused, 26712 (19 November 1998)). Given the parallels between the criterion used in the criminal and immigration contexts, and the fact they both constitute progenitors of *Palmer*, I find the line of criminal law

authorities referred to herein to be persuasive. If the appropriate analysis is undertaken, it is impossible to conclude new evidence, once admitted, has no weight.

[18] I will use but one example from the 18 new exhibits considered by the RAD to illustrate my point. The RAD accepted the applicants' new evidence that similarly situated individuals who had participated in the work of Hizmet-affiliated institutions in South Africa faced a risk to their lives. The applicants relied upon *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1; *Fi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1125, 56 Imm LR (3d) 131; *Basbaydar v Canada (Citizenship and Immigration)*, 2014 FC 158, 23 Imm LR (4th) 122). The applicants contended before the RAD that the new evidence proved that similarly situated individuals face a risk of persecution in South Africa. The RAD admitted the new evidence, thereby confirming the evidence could prove that similarly situated individuals face a risk of persecution in South Africa. It then concluded, however, that the new evidence, admitted as being material, would be accorded "no weight". If the new evidence had no weight, it should not have been admitted in the first place. The internal inconsistency is evident.

B. In the alternative, did the RAD assess documentary evidence for what it did not say rather than for what it did say?

[19] In the event I am incorrect in my view that the RAD's decision is internally inconsistent because new evidence that met the materiality criteria for admissibility purposes was afforded no weight, I remain of the view the RAD decision does not meet the test of reasonableness. The applicants contend the RAD failed to undertake an analysis of what was contained in the numerous letters and other new evidence, focusing instead on evidence it would have preferred to have before it. I agree. While a Basis of Claim form may be assessed for what it does not say,

documents from non-parties must be assessed for what they do say: see, *Botros v Canada (Citizenship and Immigration)*, 2013 FC 1046; *Mui v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020, 31 Imm LR (3d) 91. For example, the applicants submitted two letters from similarly situated individuals to the principal applicant explaining they were at risk in South Africa. The RAD summarily gave no weight to the first because it "[did] not include any information as to how the Turkish government was able to target Gulen institutions in South Africa". Similarly, it gave no weight to the second because "there is no information in the letter that the South African authorities are targeting or closing down institutions affiliated with the Gulen movement nor does [the letter] provide any information as to the high ranking individuals from South Africa who informed [the author] that certain people […] should leave the country". In both cases, the RAD failed to assess the merits of the evidence before it. The approach adopted by the RAD, in the circumstances, results in an unreasonable decision.

VI. Conclusion

[20] I allow the application for judicial review without costs. The matter is remitted to the Refugee Appeal Division, for redetermination by a different panel member. Neither party proposed a question for consideration by the Federal Court of Appeal, and none arises from the record.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is remitted to a different Program Manager for re-determination;
2. No question is certified for consideration by the Federal Court of Appeal; and
3. There is no order of costs.

"B. Richard Bell"
Judge

SCHEDULE

Immigration and Refugee Protection Act, SC 2001, c 27	***Loi sur l'immigration et la protection des réfugiés***, L.C. 2001, ch. 27
Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence

subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[…]

Evidence that may be presented

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[…]

Section E of Article 1 of the *United Nations Convention Relating to the Status of Refugees*

E This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[…]

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[…]

Section E de l'article premier de la *Convention des Nations Unies relative au statut des réfugiés*

E Cette Convention ne sera pas applicable à une personne considérée par les autorités compétentes du pays dans lequel cette personne a établi sa résidence comme ayant les droits et les obligations attachés à la possession de la nationalité de ce pays.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2370-19
STYLE OF CAUSE:	HALIL YURTSEVER v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 27, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	BELL J.
DATED:	FEBRUARY 28, 2020

APPEARANCES:

Sumeya Mulla	FOR THE APPLICANT
Stephan Jarvis	FOR THE RESPONDENT

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